JJ RAJ v. DATO' EDWARD JOHN LAWRENCE & ORS

HIGH COURT MALAYA, SHAH ALAM
SURAYA OTHMAN J
[CIVIL SUIT NO: 22NCVC-168-04-2014]
30 MARCH 2015

CIVIL PROCEDURE: *Action – Capacity to sue – First defendant diagnosed with dementia – Commencement of legal proceedings against first defendant – First defendant declared as 'mentally disordered person', 'patient' and 'person under disability' under O. 76 of Rules of Court 2012 (ROC) – Litigation representative – Leave to maintain and continue proceedings against first defendant through first defendant's litigation representative pursuant to O. 76 r. 1A ROC – Grounds of application – Whether same guiding principles for leave application under O. 53 ROC ought to be adopted*

The plaintiff was the executive secretary general of the Malaysian Leprosy Relief Association ('MALRA'). The first defendant was the executive secretary general of the MALRA from the years 2005 to 2010. After the retirement of the first defendant from the MALRA, the first defendant was diagnosed as suffering from progressing dementia. The plaintiff commenced legal proceeding against the first defendant, second defendant and the third defendant ('civil suit 168') on 4 April 2014 for the sum of RM5,387,769.61 and for breaches of fiduciary duty and duty of care (negligence) as a stakeholder and breach of trust. On 1 July 2014, an order was granted by the Shah Alam High Court (another court) declaring that the first defendant was a 'mentally disordered person' under the Mental Health Act 2001 ('Act 615') and as a 'patient' and 'person under disability' under O. 76 of the Rules of Court 2012 ('ROC') and appointed his son, one Mr Anthony a/l Edward John Lawrence, as his litigation representative ('the said order'). The plaintiff proceeded to file an application under O. 76 rr. 1A and 2 of the ROC, seeking the leave of the court pursuant to Act 615 to maintain and continue civil suit 168 against the first defendant through the first defendant's litigation representative. The main ground for the leave application was that the plaintiff could not proceed with their claim in the civil suit 168 unless leave to do so was granted by the court. In support of the application, the plaintiff submitted that the same guiding principles for leave application under O. 53 of the ROC *ie* application for judicial review should be applied for leave application under O. 76 r. 1A of the ROC. The plaintiff contended that under O. 53 of the ROC, the plaintiff needed only to show, *prima facie*, that the application was not frivolous nor vexatious and that there was some substance in the grounds supporting the application. According to the plaintiff, the court, need not go to the merits of the case at leave stage since that would be done in due course at the full substantive hearing. All that was required for the plaintiff to discharge their burden at the leave stage was to establish an arguable case based on the grounds supporting the leave

A application. On the other hand, the first defendant, submitted that it was not enough for the plaintiff to show that the first defendant was having a mental disorder. Under O. 76 r. 1A of the ROC, the first defendant argued that the plaintiff must show sufficient evidence or substantial merits and substantiate how the first defendant was involved in breach of his fiduciary duty, had
B been negligent, had committed breach of trust and had committed fraud as alleged by the plaintiff.

Held (dismissing plaintiff's application with costs; striking off plaintiff's claim against first defendant):

C **(1)** Mental Health Act 2001 is specially enacted to provide care and protection for the mentally disordered and O. 76 of the ROC has extended that protection by setting out conditions and restrictions before a mentally disordered person could be sued in court. The conditions are that leave must be sought and granted by a High Court Judge before legal proceedings could be instituted against a mentally disordered person.
D The application for leave must be supported by an affidavit setting out the grounds on which such leave is sought, any facts necessary to substantiate those grounds and that a mentally disordered person must be defended by his litigation representative. (para 24)

E **(2)** O. 76 r. 1A of the ROC should be interpreted in line with the duty of the court to extend special protection to the first defendant and to ensure that no injustice is done to the first defendant who could not, protect himself, give evidence nor give instruction to his litigation representative to defend himself against the allegations made against him. Thus in these circumstances, it is incumbent upon the court to
F construe O. 76 r. 1A of the ROC liberally in the first defendant's favour. The mere fact that leave is required to be given under O. 76 r. 1A of the ROC before a claim could be filed in court against a mentally disordered person means that no one had an automatic right to sue a mentally disordered person. (paras 25 & 26)

G **(3)** The plaintiff must show to the court 'good grounds' that would persuade the court to grant such leave. The requirements for leave under O. 76 r. 1A of the ROC are more exacting than the requirements for leave for judicial review under O. 53 of the ROC. The difference in these two orders are that while in O. 53 of the ROC affidavits are required to
H verify the facts relied on in the grounds of the application, O. 76 r. 1A(2) of the ROC required affidavits of any facts necessary to substantiate those grounds of the application. Therefore, by reading the rule as a whole, O. 76 r. 1A(2) of the ROC required the plaintiff to affirm and to file affidavits that contain evidence to support or prove the
I truth of the reason why the plaintiff wants leave to be given. Based on the facts, the reason the plaintiff wanted leave to be given is to maintain and continue with their claim against the first defendant. (paras 26, 32 & 33)

(4) In providing evidence to support or proving the truth ('substantiate those grounds'), the plaintiff had to exhibit documents through their affidavits to show the first defendant's involvement which constituted his breach of fiduciary duty, negligent breach of trust as executive secretary general and his involvement to conspire to defraud the MALRA. Unless this is done, leave should not be given under O. 76 r. 1A of the ROC. On the facts, the plaintiff merely referred and relied on their statement of claim and merely repeated their statement of claim to support their leave application without setting out any evidence, particularisation nor any exhibits to substantiate their general allegations. Thus the requirements/conditions set out by O. 76 r. 1A of the ROC had not been established by the plaintiff for this court to exercise its judicial discretion to grant leave for the plaintiff to maintain and continue their claim against the first defendant. (paras 37, 38 & 40)

Case(s) referred to:

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Ziko Abbo & Anor v. Ketua Polis Daerah Bau, Kuching, Sarawak & Ors [2011] 3 CLJ 76 CA ***(refd)***

Legislation referred to:

Mental Health Act 2001, s. 51

Rules of Court 2012, O. 41 r. 11, O. 53 r. 3, O. 76 rr. 1A(2), 2(1)

For the plaintiff/applicant - Rudeen Chua Kim Hong; M/s Rajendran & Deen

For 1st defendant/respondent - Barry Goh Meng Yew; M/s Iza Ng Yeoh & Kit

Reported by Sandra Gabriel

JUDGMENT

Suraya Othman J:

Introduction

[1] The plaintiff filed an application under O. 76 rr. 1A and 2, Rules of Court 2012 [PU(A) 205/2012] ("ROC 2012") seeking the leave of this court pursuant to the Mental Health Act 2001 (Act 615) to maintain and continue their proceedings against the first defendant, Dato' Edward John Lawrence through his litigation representative, Mr Anthony a/l Edward John Lawrence. I heard this application and dismissed it. As the plaintiff had obtained judgments in default against the second and third defendants, and since I refused to grant leave to the plaintiff to continue proceedings against the first defendant, I then proceeded to strike off the plaintiff's claim against the first defendant. The plaintiff, dissatisfied, appealed against my decision.

A **Grounds For The Application**

[2] The grounds of the application are as follows:

(a) after the writ and the statement of claim dated 4 April 2014 was filed, the first defendant was, *inter alia*, declared mentally disordered pursuant to the Mental Health Act 2001 as a person under disability or a patient under O. 76 ROC 2012 by order of the Shah Alam High Court, Originating Summons No. 24-656-06-2014 dated 1 July 2014 ("said order");

(b) in the said order, Anthony a/l Edward John Lawrence, the first defendant's son was appointed as the litigation representative of the first defendant for the purpose of defending the first defendant in any legal suit.

(c) leave of this court is necessary to maintain or continue proceedings against the first defendant through his litigation representative as per the said order.

(d) plaintiff's application against the first defendant is *bona fide* and does not prejudice the rights of the first defendant.

(e) further reasons as per the supporting affidavit of J.J Raj (Jr) filed herein.

Affidavits Filed

[3] The relevant affidavits filed by the plaintiff and the first defendant's litigation representative in respect of the leave application are as follows:

(a) plaintiff's supporting affidavit affirmed by JJ Raj ("JJ Raj") on 24 July 2014 ("supporting affidavit");

(b) first defendant's affidavit in reply affirmed by Anthony a/l Edward John Lawrence ("Anthony") on 3 September 2014 ("Dl's affidavit in reply");

(c) plaintiff's affidavit in reply affirmed by JJ Raj on 4 October 2014 ("P's affidavit in reply");

(d) first defendant's litigation representative's affidavit in reply affirmed by Anthony on 13 October 2014 ("Dl's litigation representative's affidavit in reply");

(e) plaintiff's affidavit in reply (2) affirmed by JJ Raj on 24 October 2014 ("P's affidavit in reply (2)").

Background Facts

[4] The background facts are as follows:

(a) The plaintiff is currently the executive secretary general of the Malaysian Leprosy Relief Association ("MALRA"). The plaintiff also held the position of vice president of MALRA from the year 2007 till 2009.

(b) The first defendant was the executive secretary general of MALRA from the year 2005 to 2010 and ceased any work for MALRA on or about January 2011.

(c) The second defendant was the treasurer of MALRA while the third defendant was a member of the executive committee of MALRA. The second and third defendants were also the partners and solicitors for the firm of Messrs Lawrence & Joseph during the material period.

(d) After the retirement of the first defendant from MALRA, he was diagnosed as suffering from progressing dementia with compromised cognition and memory leading to unconscious confabulation.

(e) The plaintiff commenced legal proceeding against all the three defendants on 4 April 2014 in Civil Suit No. 22NCVC-168-04-2014 for the sum of RM5,387,769.61 and for breach of fiduciary duty, breach of duty of care (negligence) as a stakeholder and breach of trust as solicitors for the plaintiff and as executive committee members of MALRA.

(f) On 1 July 2014, an order was granted by the Shah Alam High Court in respect of Originating Summons No. 24-656-06-2014 (another court) declaring that the first defendant is a "mentally disordered person" under the Mental Health Act 2001 and as a "patient" and "person under disability" under O. 76 ROC 2012 and appointing his son, Dr Anthony Lawrence, as his litigation representative ("said order").

(g) Thereafter the plaintiff proceeded to file this application under O. 76 rr. 1A and 2 ROC 2012 in order to maintain and continue their civil suit against the first defendant (Civil Suit No. 22NCVC-168-04-2014).

Decision Of This Court

[5] The plaintiff/applicant was represented by Mr Rudeen Chua Kim Hong and the first defendant/respondent was represented by Mr Barry Goh Meng Yew.

[6] Mr Rudeen Chua submitted that the main ground for the leave application under O. 76 ROC 2012 is that the first defendant has been declared "mentally disordered" under the Mental Health Act 2001 and/or as a "person under disability" under O. 76 ROC 2012 pursuant to the said court order dated 1 July 2014 in Originating Summons No. 24-656-06-2014. Under the said order, the plaintiff cannot proceed with their claim in the present Civil Suit No. 22NCVC-168-04-2014 unless leave to do so is granted by this court.

[7] Mr Rudeen Chua further submitted that the same guiding principles for leave application under O. 53 ROC 2012 (application for judicial review) applies for leave application under O. 76 r. 1A ROC 2012 which is, the applicant need only to show, *prima facie*, that the application is not frivolous

A or vexatious and that there is some substance in the grounds supporting the application. He cited the case of *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 at p. 35, line G in support of his contention.

B **[8]** He contended that this court ought not go into the merits of the case at the leave stage as its role is only to see if the application for leave is not frivolous or otherwise (*Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 at p. 943, line F).

[9] He argued that the phrase "substantiate" in O. 76 r. 1A(2) refers to the C condition of the first defendant who is mentally unsound and not to substantiate the claim.

[10] In fact, he submitted that *inter partes* leave hearing should not be too extensive as a full substantive hearing (*Tan Kwor Ham (supra)* at p. 945, line G cited). It suffice, according to him, that the plaintiff in their affidavits had D referred to and relied on the facts as pleaded in the statement of claim in their leave application to establish an arguable case against the first defendant which requires further investigation of its merits at the main trial.

[11] Mr Barry Goh, on the other hand, submitted that the plaintiff is obliged to show sufficient evidence in his application under O. 76 r. 1A. E According to him, the plaintiff must show that their claim has substantial merits to enable this court to exercise its judicial discretion to grant leave.

[12] He argued that it is not sufficient to merely show that the first defendant is mentally disordered. The plaintiff has to go further and show or substantiate how the first defendant is involved in breach of his fiduciary F duty, had been negligent, had committed breach of trust and committed fraud as alleged by the plaintiff/applicant.

Mental Health Act 2001 And O. 76 ROC 2012

Let us now peruse the Mental Health Act 2001 (Act 615) and O. 76 ROC G 2012 [P.U. (A) 205/2012]

[13] Under the preamble of the Mental Health Act 2001 (Act 615), it is stated that the Act is:

> An Act to consolidate the laws relating to mental disorder and to provide for the admission, detention, lodging, care, treatment, H rehabilitation, control and protection of persons who are mentally disordered and for related matters.

(a) Under Part X of the Act, for proceedings in inquiries into mental disorder, under s. 51, it states that:

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Interpretation

51. In this Part

"Court" means the High Court;

"mentally disordered person" means any person found by due course of law to be mentally disordered and incapable of managing himself and his affairs.

[14] Order 76 ROC 2012 states:

1. In this Order

"the Act" means the Mental Health Act 2001 [Act 615];

"person under disability" means a person who is a minor or a patient;

"patient" means a mentally disturbed person within the meaning of the Act.

(a) Order 76 r. 1A states:

Application for leave to institute proceedings (O. 76, r. 1A)

1A. (1) The jurisdiction of the High Court to grant leave pursuant to the Mental Health Act 2001 to bring proceedings against a person may be exercised only by a high Court Judge.

(2) The application shall be supported by an affidavit setting out the grounds on which such leave is sought and any facts necessary to substantiate those grounds.

(b) Order 76 r. 2 states:

Person under disability shall sue by litigation representative (O. 76 r. 2)

(1) A person under disability may not bring, make a claim in, defend, make a counterclaim in, or intervene in any proceedings, or appear in any proceedings under a judgment or order notice of which has been served on him, except by his litigation representative.

(2) Subject to the provisions of these Rules, anything which in the ordinary conduct of any proceedings is required or authorised by a provision of these Rules to be done by a party to the proceedings shall or may, if the party is a person under disability, be done by his litigation representative.

(3) A litigation representative of a person under disability shall act by a solicitor.

[15] Learned counsel informed me that there seems to be no reported cases pertaining to leave application under O. 76 r. 1A ROC 2012.

[16] In such absence, Mr Rudeen Chua suggested that the general principles which apply to other forms of leave application under ROC 2012, where applicable, be adopted as a guiding principle. He argued that since the guiding principles for leave application under O. 53 ROC 2012 (application for judicial review) are well established, it should be adopted in this application.

[17] If it is adopted, Mr Rudeen Chua submitted that the applicant under O. 53 need only to show, *prima facie*, that the application is not frivolous nor vexatious and that there is some substance in the grounds supporting the application. The court, according to him, need not go to the merits of the case at leave stage since that will be done in due course at the full substantive hearing. All that is required for the applicant to discharge their burden at the leave stage is to establish an arguable case based on the grounds supporting the leave application.

[18] Mr Barry Goh, on the other hand, submitted that it not enough for the applicant to show that the first defendant is mentally disordered. The applicant under O. 76 r. 1A must show sufficient evidence or substantial merits, in fact the applicant must go further and substantiate how the first defendant is involved in breach of his fiduciary duty, had been negligent, had committed breach of trust and had committed fraud as alleged by the plaintiff/applicant.

[19] Having heard from both learned counsel, it has to be acknowledged from the onset that a mentally disordered person cannot and should not be treated like an ordinary son, with all his mental faculties intact, who, in the ordinary circumstances, would be capable of taking care of himself and managing his daily needs and affairs. That is why a specific Act, (Mental Health Act 2001), was specially enacted for the purpose of providing care and protection for the mentally disordered person. As the preamble to the said Act states "An Act to consolidate the laws relating to mental disorder and to provide for the admission, detention, lodging, care, treatment, rehabilitation, control and protection of persons who are mentally disordered and for related matters."

[20] The said Act, under Part X s. 51, has also defined a "mentally disordered person" as "any person found by due course of law to be mentally disordered and incapable of managing himself and his affairs."

[21] The provision of O. 76 ROC 2012 extended the protection given to "person under disability". Order 76 covers protection not only to the mentally disordered person but also to minors. This is so since the interpretation of a "person under disability" under O. 76 means a person who is a minor or a patient. "Patient" under O. 76 means or is defined as a "mentally disturbed person within the meaning of the Act" (Mental Health Act). Thus the law recognises that a minor or a mentally disordered person are not capable of managing their affairs on their own and has to be protected.

[22] Order 76 r. 1A disallow the institution of a legal action against a minor or a mentally disordered person without the leave of a High Court Judge. Order 76 r. 2 disallow a minor or a mentally disordered person from instituting a legal action or defending a legal action or take part in any legal action except by his litigation representative.

[23] In the Court of Appeal's case in *Ziko Abbo & Anor v. Ketua Polis Daerah Bau, Kuching, Sarawak & Ors* [2011] 3 CLJ 76 at p. 81 paras. 14 to 15 the court having regard to O. 76 r. 2(1) states:

> [14] Under O. 76 r. 2(1), a person under disability does not have the capacity to bring proceedings in court. However, to this general procedural rule, there is a built-in exception in O. 76 r. 2(1) whereby the plaintiff may do so by this next friend.
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> [15] The legislative purpose of O. 76 r. 2(1) is certainly not to create obstacles or to cause obstructions. It is intended to be facilitative in the sense that it seeks to give access to justice specifically for, *inter alia*, a patient. It belongs to a species of social legislation which must be construed liberally in favour of a patient. Order 76 r. 2(1) must be interpreted to promote its legislative purpose. This purposive interpretation is consistent with s. 17A of the Interpretation Acts 1948 and 1967 which reads:
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> > Regard to be had to the purpose of Act
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> > 17A. In the interpretation of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[24] Thus from the wordings of the preamble of the Mental Health Act and O. 76 ROC, it is the legislative intent and a matter of public policy to provide protection to the mentally disordered person due to the fact that the mentally disordered person is considered as a "patient" under the Mental Health Act and are thus a "person under disability" under O. 76 ROC, who, by law, are deemed incapable of managing themselves and their affairs. A specific Act (Mental Health Act 2001) is specially enacted to provide care and protection for the mentally disordered and O. 76 ROC 2012 has extended that protection by setting out conditions and restrictions before a mentally disordered person can be sued in a court of law. The conditions are that leave must be sought and granted by a High Court Judge before legal proceedings can be instituted against a mentally disordered person (O. 76 r. 1A); the application for leave must be supported by an affidavit setting out the grounds on which such leave is sought and any facts necessary to substantiate those grounds (O. 76 r. 1A(2) and that a mentally disordered person must be defended by his litigation representative (O. 76 r. 2). All these conditions and restrictions are provisions that were enacted as a species of social legislation that is designed to provide justice for a mentally

A disordered person who cannot defend himself or give instruction to his litigation representative and the rule must, (therefore), be construed liberally in favour of the patient, which in this case is the first defendant to promote its legislative purpose and intent (*Ziko Abbo & Anor v. Ketua Polis Daerah Bau, Kuching, Sarawak & Ors (supra).*

B **[25]** I agree with learned counsel for the first defendant Mr Barry Goh that O. 76 r. 1A should be interpreted in line with the duty of the court to extend special protection to the first defendant and to ensure that no injustice is done to the first defendant who cannot, as stated before, protect himself, give evidence nor give instruction to his litigation representative to defend himself C against the allegations made against him. Thus in these circumstances, it is incumbent upon the court to construe O. 76 r. 1A liberally in the first defendant's favour.

[26] The mere fact that leave is required to be given under O. 76 r. 1A before a claim can even be filed in court against a mentally disordered person D means that no one has an automatic right to sue a mentally disordered person. The fact that leave from a High Court Judge must first be obtained before commencing proceedings means that before such permission is given, the proposed plaintiff must show to the court "good grounds" that will persuade the court to grant such leave. The need to ensure that no injustice is done to E the first defendant and the need to construe r. 1A liberally in favour of the first defendant means that the court must require sufficient grounds to ensure that justice is done to the first defendant who is unable to give evidence in his own stead nor to even advise the solicitors acting for his legal representative.

F **[27]** It must be noted that the plaintiff had already filed a suit against the first defendant together with the second and third defendants on 4 April 2014 and that leave has to be sought from this court to maintain and continue with the suit due to the first defendant being declared by another High Court to be mentally disordered on 1 July 2014. The plaintiff's cause of action against G the defendants, as disclosed from the statement of claim, in gist, are as follows:

(a) breach of fiduciary duties as the former executive secretary general of the MALRA with regards to irregularities in management and/or administration of MALRA together with the second and third H defendants;

(b) in particular, following recent internal investigation and/or audit conducted by MALRA, there were findings of losses suffered by MALRA with regards to the sale transaction of MALRA's land in Kelantan during the tenure of the defendants, including, but not limited I to failure to forfeit the deposit of RM400,440 against a purchaser for failure to complete the sale; irregularities in the selection process of the purchaser resulting in losses of RM2,947,837.50; balance purchase

price of RM1,636,369 paid by a subsequent purchaser but not accounted for in MALRA's audited accounts ending 2007 and valuation reports for the land not obtained on a timely basis and not submitted to MALRA's EXCO for consideration;

(c) breach of duty of care and/or breach of trust as stakeholders of MALRA resulting in loss of 'legal fees' paid to Messrs Lawrence & Joseph of RM28,000 which ought not to be paid and loss of opportunity costs totalling RM336,788.85 for failure to promptly secure the release of payment made to Messrs Lawrence & Joseph by the purchaser and/or for failed investment.

[28] The plaintiff submitted that the first defendant is named as a party to the action by virtue of his position and/or role as the executive secretary general of MALRA at all material times, who was in charge of and/or entrusted with the day to day running and management of MALRA together with the second and third defendants who were MALRA's treasurer and/or Exco members and as such the defendants had played an active and influential role in the affairs of MALRA including its decision making process.

[29] Alternatively, the plaintiff contended that the defendants were the "alter ego" of MALRA due to their respective roles and/or positions in MALRA. The first defendant together with the second and third defendants owed a fiduciary duty and/or duty of care to MALRA to act for its benefit including to honestly and competently disclose, inform and advise MALRA of any action taken by them, and also a duty to account, including keeping all books and accounts of MALRA in order and up-dated. All these particulars and details of the relevant facts pleaded against the defendants are found in the plaintiff's statement of claim.

[30] The first defendant's litigation representative had raised various issues to challenge the leave application including, *inter alia*, the physical and mental health of the first defendant; the first defendant's contribution to MALRA's cause; the lack of particulars and evidence relating to the first defendant's breach; the standard of proof by the plaintiff which is beyond reasonable doubt and the fact that the first defendant's action is subject to the instructions of the president or vice president of MALRA.

[31] In rebuttal, the plaintiff submitted that the issues raised by the first defendant's litigation representative at this leave stage is premature and would be analogous to hearing the full merits of the case, which is not the intention of the leave application. On the contrary, to deliberate on the issues raised by the first defendant's litigation representative at this stage would, according to learned counsel Mr Rudeen Chua, fall foul of the guiding principles of a leave application in cases of judicial review (O. 53 ROC) and unnecessarily impose a higher burden to be discharged by the plaintiff at this stage.

[32] I tend to disagree with Mr Rudeen Chua's interpretation of O. 76 r. 1A. In fact I am in agreement with Mr Barry Goh that the requirements for leave under O. 76 r. 1A are more exacting than the requirements for leave for judicial review under O. 53. This can be seen from the different and stronger wordings used in O. 76 r. 1A. For convenience and for comparison, O. 53 r. 3 and O. 76 r. 1A are reproduced below.

> Leave (O. 53 r. 3)
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> 3. (1) An application under this order shall not be made unless leave therefore has been granted in accordance with this rule.
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> (2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.
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> Application for leave to institute proceedings (O. 76 r. 1A)
>
> 1A. (1) The jurisdiction of the High Court to grant leave pursuant to the Mental Health Act 2001 to bring proceedings against a person may be exercised only by a High Court Judge.
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> (2) The application shall be supported by an affidavit setting out the grounds on which such leave is sought and any facts necessary to substantiate those grounds.

[33] In both orders, affidavits are required to be affirmed to support the application which means that evidence has to be presented by the proposed plaintiff to support the application. The nature of an affidavit is that it is a statement of evidence that is sworn or affirmed by the person making the statement before a commissioner for oaths with documents that are to be used in conjunction with the affidavit being exhibited and annexed to the affidavit with a certificate of the commissioner for oaths (O. 41 r. 11 of ROC 2012).

[34] The difference in these two orders are that while in O. 53, affidavits are required to verify the facts relied on in the grounds of the application; O. 76 r. 1A(2) requires affidavits of any facts necessary to **substantiate those grounds** of the application (emphasis added).

[35] "Grounds" means that the plaintiff must show the factual basis and reasons why the alleged claim has merits. To provide grounds means to provide cogent explanation to support and particularise and convince the judge that the claim is sound. Further, r. 1A(2) states that the affidavit must also provide facts necessary to substantiate those grounds. According to *Oxford English Dictionary*, "substantiate" means "to provide evidence to support or prove the truth of (a charge, statement, claim etc; give good grounds for" and "fact" means "a thing that is known or proved to be true ... information used as evidence ... the truth about events as opposed to interpretation."

[36] Thus, reading the rule as a whole, I agree with Mr Barry Chua that O. 76 r. 1A(2) requires the plaintiff to affirm and to file affidavit/affidavits that contain/s evidence to support or prove the truth of the reason why the plaintiff wants leave to be given. The reason why the plaintiff wants leave to be given is to maintain and continue with their claim against the first defendant (who has been declared as being mentally disordered) whom the plaintiff alleged has breached his fiduciary duty, has been negligent and has committed breach of trust and fraud while holding the position of executive secretary general in MALRA which led to MALRA suffering heavy losses.

[37] In providing evidence to support or proving the truth of ("substantiate those grounds") of the plaintiff's allegation of breach of fiduciary duty negligence, breach of trust and fraud committed by the first defendant which led to MALRA suffering heavy losses, the plaintiff, to my mind, must exhibit documents constituting evidence of the alleged breach of fiduciary duty, negligence, breach of trust and fraud committed by the first defendant and also evidence of the losses suffered by MALRA. In other words, the plaintiff has to exhibit documents through their affidavits to show the first defendant's involvement which constitute his breach of his fiduciary duty, negligence breach of trust as executive secretary general and his involvement to conspire to defraud MALRA. Unless this is done, leave should not be given under O. 76 r. 1A.

[38] Further, the plaintiff merely referred and relied on their statement of claim, in fact, merely repeating their statement of claim to support their leave application without setting out any evidence, particularisation nor any exhibits (documents) to substantiate their general allegations.

[39] In our instant application, the plaintiff failed to show any documents, what more, any evidence, to support their allegations against the first defendant to enable this court to judicially exercise its discretion. All the plaintiff can come out with is a bare averment that they had conducted an internal investigation and audit which had unearthed evidence of losses by MALRA which losses they alleged were due to the breach of fiduciary duty, breach of duty of care (negligence), breach of trust and conspiracy to defraud by the defendants without particularising those acts which constitute breach of fiduciary duty, trust, negligence, conspiracy and fraud: what more any documents to support these allegations.

[40] In the circumstances, the plaintiff has failed to show good grounds or sufficient evidence to support their claim other than merely to repeat their statement of claim. Thus the requirements/conditions set out by O. 76 r. 1A has not been met/established by the plaintiff for this court to exercise its judicial discretion to grant leave for the plaintiff to maintain and continue their claim against the first defendant

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Conclusion

[41] Under O. 76 ROC, it is the legislative intent and a matter of public policy to protect the mentally disordered person due to the fact that the mentally disordered person is considered a "patient" under the Mental Health Act and are thus a "person under disability" under O. 76 ROC, who, by law, are deemed incapable of managing themselves and their affairs. A specific Act (Mental Health Act 2001) has been specially enacted to provide care and protection for the mentally disordered and O. 76 ROC 2012 has extended that protection by setting out conditions and restrictions before a mentally disordered person can be sued in a court of law. The conditions are that leave must be sought and granted by a High Court Judge before legal proceedings can be instituted against a mentally disordered person (O. 76 r. 1A); the application for leave must be supported by an affidavit setting out the grounds on which such leave is sought and any facts necessary to substantiate those grounds (O. 7 r. 1A(2) and that a mentally disordered person must be defended by his litigation representative (O. 76 r. 2). All these conditions and restrictions are provisions that were enacted as a species of social legislation that is designed to provide justice for a mentally disordered person who are incapable of giving evidence or give instruction to his litigation representative and the rule must, (therefore), be construed liberally in favour of the patient, which in this case is the first defendant, to promote the legislative intent and purpose of O. 76 and the Mental Health Act 2001.

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[42] Therefore, the plaintiff's application for leave is dismissed with costs of RM2,000. As I have refused to grant leave to the plaintiff to proceed against the first defendant and judgments in default had been obtained against the second and third defendants, the plaintiff's claim against the first defendant is thereby struck off.

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